Kmart Corporation *and* Union of Needletrades, Industrial, and Textile Employees, AFL–CIO, CLC. Case 11–CA–17778

June 21, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On August 14, 1998, Administrative Law Judge Pargen Robertson issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided, for the reasons set forth below, to affirm the judge's rulings,[1] findings, and conclusions, and to adopt the judge's recommended Order.

In 1996 the Respondent and the Union reached agreement on their first collective-bargaining agreement, which was effective from July 28, 1996,[2] through July 27, 1999. Appendix A of the contract specifies the wage rates for all unit jobs, varying according to length of employment, during the first year of the contract. For the second and third years of the contract, the agreement specifies only the wage rates for "top out"[3] employees. Top out employees were scheduled to receive raises of 75 cents per hour in the second and third years of the contract. The contract is silent as to wage rates for non-top out employees for the second and third years.

In July 1997 the Respondent granted a 75-cent-wage increase to top out employees, but provided no raises to other unit employees. The Union and the General Counsel contend that the parties agreed at the bargaining table to an across-the-board wage increase of 75 cents per hour for the second and third years of the contract. The Respondent argued that the contract required second and third year raises for top out employees only. We agree for the reasons that follow.

The issue presented in this case turns on the meaning of the wage chart in Appendix A of the parties' collective-bargaining agreement. The Board has held that in matters of contract interpretation, "the parties' actual intent underlying the contractual language in question is always paramount." *Mining Specialists*, 314 NLRB 268 (1994). Intent is determined by examining "both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the . . . implementation of the contract provision in question, or the bargaining history of the provision itself." Id. at 269. Accordingly, to determine the meaning of the wage chart, we must examine the literal language of Appendix A, as well as the extrinsic evidence regarding the parties' intent.

The wage chart in Appendix A is reproduced in the attached judge's decision. Second and third year raises are mentioned for top out employees only. The chart does not specify raises in the second and third years for other unit employees. Thus, the express terms of the contract required the Respondent to grant a wage increase to top out employees only. Because this contract represents the first agreement reached by the parties for unit employees, there is no past practice as such. Evidence was presented, however, regarding how the contract was interpreted. In particular, the Union relies on remarks by a human resource supervisor to new hires that they would receive a 75-cent increase in July 1997. Given that this supervisor did not participate in the negotiations and that the Respondent did not, in fact, grant the 75-cent raise to the new hires, we find that the supervisor's comments are not probative of the parties' intent.[4]

Turning to the bargaining history, the Respondent's bargaining notes support its position that only top out employees were to receive second and third year wage increases. On May 23, the Respondent presented a written wage proposal, which used the same format as the wage chart to which the parties eventually agreed. The notes of Peter Palmer, the Respondent's lead negotiator, indicate that he explained that the proposal was for a 50-cent increase for all unit employees, but that the second and third year increases of 25 cents were "for the top out only."[5] According to the notes, Bruce Raynor, secretary/treasurer of the International Union and one of the negotiators, replied, "We understand the wage proposal, what about the benefit package."

Some of the Union's wage proposals confirm Raynor's acknowledgement that he understood that the Respondent's wage chart provided second and third year increases for top out employees only. On February 6 and May 9, the Union admittedly proposed increases for top out employees.[6] These Union proposals used language and format similar to that contained in the final contract.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All subsequent dates refer to 1996 unless specified otherwise.

[3] It is undisputed that this term denotes employees who have reached the highest level of pay for their job based on length of service in that position. The Respondent's employees top out in their jobs at 2 years.

[4] The Union also relies on a company press release issued July 25, 1996. We agree with the judge, however, that the press release does not indicate whether employees other than top out employees were to receive a wage increase at the beginning of the second year of the contract.

[5] In subsequent negotiations, the amounts of the second and third year increases were increased to 75 cents.

[6] Raynor explained that the Union was attempting to compromise.

In sum, the bargaining history shows that the final agreement utilized language and format that both parties used during negotiations to propose increases for top out employees only. This evidence strongly suggests that the parties intended the final agreement to provide increases for top out employees only in the second and third years.

The Union claims, based on some additional bargaining history evidence, that the contract language was intended to provide across-the-board raises for all 3 years of the contract. Thus, the Union notes that the Respondent gave its unit employees two across-the-board 50-cent-wage increases during the negotiations leading up to the July agreement: one in March 1996 and one in July 1996 when agreement was reached on the contract. On July 23 the last bargaining session, Palmer offered a final proposal including an immediate across-the-board 50-cent-wage increase (the second of the two 50-cent increases) and second and third year increases of 75 cents. The Respondent's written proposal reads like the contract language, referring only to top out employees for the second and third years of the contract. During the bargaining session, and after the Union caucused and decided to accept the Respondent's offer, Rita Cockman, an employee on the union bargaining committee, asked if "this raise" was across-the-board. The Respondent's general manager, Dale Rosser, replied that "it was across the board."

This exchange gives rise to an ambiguity regarding whether Rosser was referring to the 50-cent-wage increase or the entire package of three wage increases when he said "it was across the board." In light of the plain language of the Respondent's proposal which, like the contract language, specified second and third year wage increases for top out employees only, and the bargaining history evidence discussed above showing that the Union understood the limited scope of the Respondent's wage proposal, we conclude that Rosser's ambiguous remark is insufficient to show that the parties intended all employees to receive a wage increase in the second and third years of the contract.

Accordingly, we conclude that the collective-bargaining agreement provided for second and third year wage increases for top out employees only, and that, consequently, the Respondent did not violate the Act by failing to grant across-the-board increases on July 28, 1997.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Jasper Brown, Esq., for the General Counsel.
Charles P. Roberts III, Esq., of Greensboro, North Carolina, for Respondent.
David Prouty, Esq., of New York, New York, for the Union.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held on June 24, 1998, in Greensboro, North Carolina. The charge was filed on January 7 and amended on April 10, 1998. A complaint was issued on April 20, 1998. This decision is based on review of the entire record and briefs filed by Respondent, the Union, and the General Counsel.

JURISDICTION

Respondent admitted that it is a Michigan corporation with a distribution center located in Greensboro, North Carolina, where it is engaged in the distribution of products to retail stores in North Carolina, South Carolina, Virginia, West Virginia, and Tennessee. It admitted that during the past 12 months, a representative period, at its Greensboro, North Carolina distribution center, it purchased and received goods and materials valued in excess of $50,000, and it sold and shipped products valued in excess of $50,000, directly to and from points outside North Carolina. It admitted that it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (Act), at material times.

Labor Organization

Respondent admitted Union of Needletrades, Industrial, and Textile Employees, AFL–CIO, CLC, has been a labor organization within the meaning of Section 2(5) of the Act, at all material times.

The Unfair Labor Practice Allegations

Respondent admitted that the following employees constitute an appropriate unit for the purposes of collective bargaining and that the Union has been their exclusive collective-bargaining representative at all times since September 20, 1993:

> All hourly regular full-time and regular part-time associates, including plant clerical and all hourly paid associates with the job title of "group leaders," receiving "group leaders," casepack "group leaders," repack "group leaders," shipping "group leaders," maintenance "group leaders," merchandising "group leaders," loss prevention "group leaders," traffic "group leaders," accelerated flow through "group leaders," quality assurance "group leaders," and non-con "group leaders," employed at the Respondent's Greensboro, North Carolina distribution center, excluding all office clericals, professionals, technical associates, over-the-road truck drivers, salespersons, guards, and supervisors as defined in the Act.

The Respondent and the Union are parties to a collective-bargaining agreement, which is effective from July 28, 1996, through July 27, 1999.

That contract (R. Exh. 3) included a zipper clause which stated among other things that the agreement contains the entire understanding, undertaking, and agreement of the Company and the Union.

At the end of the first contract year, around July 28, 1997, Respondent granted a 75-cent-wage increase to all its employees with 2 or more years of service. Employees with less than 2 years of service were not granted a wage increase. That action

provoked the instant controversy. The Union and the General Counsel contend that all employees should have received a wage increase in July 1997.

The wage provisions of the contract are contained in appendix "A" which includes the following:

WAGES
FIRST YEAR

	GWN & GM	Clerical	Skill Main	HSKP
Start	$7.75	$7.00	$11.00	$6.50
90 Days	8.00	7.25	11.25	6.75
6 Months	8.50	7.75	11.75	7.25
1 Year	8.75	8.00	12.00	7.50
18 Months	9.00	8.50	12.50	8.00
2 Years	9.50	9.00	13.00	8.50
Second Year (Effective Date Based on Contract)				
Top Out	10.25	9.75	13.75	9.25
Third Year (Effective Date Based on Contract)				
Top Out	11.00	10.50	14.50	10.00

There was evidence regarding the intent of the parties during negotiations. Bruce Raynor is secretary/treasurer of the International Union. He was involved in negotiations with Respondent. The parties negotiated for about 3 years before reaching an agreement during July 1996. Before that an agreement was reached for Respondent to grant all employees a 50-cent-wage increase in March 1996. An additional 50-cent-wage increase was given to all employees when an agreement was reached in July 1996. Raynor testified there was never any discussion about limiting pay increases to top out rate. Bruce Raynor agreed that he was familiar with the term "top out" and that the top out in the parties' contract was at 2 years. He testified that he believes there was an error in appendix A of the contract and that the second and third year raises should be "across the board" rather than "top out." That appendix A includes only an abbreviated form of the wage agreement showing only top out when it was known that all the other wage steps would be included. He recalled that General Manager Dale Rosser responded to a question during negotiations to the effect that the second and third year raises were across the board.

The Union made written economic proposals on February 6 (R. Exh. 5) and May 9, 1996 (R. Exh. 6), which specified that each of the wage rates proposed was for the "top rate of pay." However, Bruce Raynor testified that when Respondent moved from 50 cents to 75 cents in negotiations in the latter years of the contract, the term "top out" was never used.

Cameron Hodge was formerly Respondent's human resources manager. He was involved in contract negotiations on February 6 as well as during May 1996. Hodge testified that Union Representative Raynor presented a wage proposal on February 6 identified as Respondent Exhibit 5. Raynor explained that top out rates were for the second and third year employees. He said something to the effect that he felt the lower progression rates were where they should be. Hodge denied that anyone with Respondent ever said that the proposed second and third year wage increases were for anyone other than top out employees.

Former General Manager Dale Rosser was present during negotiations for the 1996 contract. Rosser denied that Peter Palmer ever said Respondent's proposed increases for the second and third years were anything but top out increases. Rosser denied that he ever said that the proposed second and third year wage increases were across the board. He did not recall Rita Cockman asking if wage proposals were across the board. Rosser testified that employees came to him after July 1997 and asked why they had not received a wage increase. He told the employees that was a corporate matter and that he would check on it. When he got back to the employees he told them the July raise was only for top out employees.

Respondent's vice president, Labor Relations Assistant General Counsel Peter Palmer attended negotiations from April 1996. He was lead negotiator. He presented the following written wage proposal to the Union on May 23, 1996 (R. Exh. 11):

WAGES
FIRST YEAR

	GWN & GM	Clerical	Skill Main	HSKP
Start	$7.75	$7.00	$11.00	$6.50
90 Days	8.00	7.25	11.25	6.75
6 Months	8.50	7.75	11.75	7.25
1 Year	8.75	8.00	12.00	7.50
18 Months	9.00	8.50	12.50	8.00
2 Years	9.50	9.00	13.00	8.50
Second Year (Effective Date Based on Contract)				
Top Out	9.75	9.25	13.25	8.75
Third Year (Effective Date Based on Contract)				
Top Out	10.00	9.50	13.50	9.00

Palmer denied that he ever said that second and third year raises would be across the board or that those raises would be for anyone other than top out people. On July 23 Palmer presented three wage proposals. The first one had been prepared before the meeting (R. Exh. 7):

WAGES
FIRST YEAR

	GWN & GM	Clerical	Skill Main	HSKP
Start	$7.75	$7.00	$11.00	$6.50
90 Days	8.00	7.25	11.25	6.75
6 Months	8.50	7.75	11.75	7.25
1 Year	8.75	8.00	12.00	7.50
18 Months	9.00	8.50	12.50	8.00
2 Years	9.50	9.00	13.00	8.50
Second Year (Effective Date Based on Contract)				
Top Out	10.00	9.50	13.50	9.00
Third Year (Effective Date Based on Contract)				
Top Out	10.50	10.00	14.00	9.50

The second July 23 proposal was prepared on Attorney Bruce Petesch's personal computer (R. Exh. 8):

WAGES
FIRST YEAR

	GWN & GM	Clerical	Skill Main	HSKP
Start	$7.75	$7.00	$11.00	$6.50
90 Days	8.00	7.25	11.25	6.75
6 Months	8.50	7.75	11.75	7.25
1 Year	8.75	8.00	12.00	7.50
18 Months	9.00	8.50	12.50	8.00
2 Years	9.50	9.00	13.00	8.50
Second Year (Effective Date Based on Contract)				
Top Out	10.25	9.75	13.75	9.25
Third Year (Effective Date Based on Contract)				
Top Out	10.75	10.25	14.25	9.75

Palmer's final proposal was accepted by the Union on ratification and is included in the collective-bargaining agreement (R. Exh. 3):

	WAGES FIRST YEAR			
	GWN & GM	Clerical	Skill Main	HSKP
Start	$7.75	$7.00	$11.00	$6.50
90 Days	8.00	7.25	11.25	6.75
6 Months	8.50	7.75	11.75	7.25
1 Year	8.75	8.00	12.00	7.50
18 Months	9.00	8.50	12.50	8.00
2 Years	9.50	9.00	13.00	8.50
Second Year (Effective Date Based on Contract)				
Top Out	10.25	9.75	13.75	9.25
Third Year (Effective Date Based on Contract)				
Top Out	11.00	10.50	14.50	10.00

Respondent has employed Rita Cockman and Robyn Estes since 1992. Both were members of the 1996 union negotiating committee. Cockman attended a negotiation session in July 1996 when Respondent made a wage proposal. Subsequently Peter Palmer said the wage proposal was across the board. Cockman asked what across the board meant and General Manager Dale Rosser replied, it meant that everybody gets it. Cockman's notes were introduced (GC Exh. 2).

Estes recalled that after changing proposals and a caucus, Peter Palmer read a wage proposal to the Union committee. Palmer read that "there was an across the board fifty cent raise which would go into effect immediately, and then there was to be two seventy-five cent raises on the anniversary of the contract the next two years." Rita Cockman asked, if this was across the board, Dale Rosser said it was and no one else from the Companyside said anything.

Respondent presented several witnesses including Dale Rosser, Peter Palmer, and Bruce Petesch, that denied anyone from Respondent said anything to the effect that the second and third year wage increases were across the board.

After the parties reached agreement, the Union and Respondent exchanged drafts of the contract before printing. Bruce Petesch testified that he and Union Attorney David Prouty worked together to produce the final draft of the contract.

There was evidence regarding how the contract was interpreted. Tyrone Holloman Jr. has worked for Respondent since December 1996. He along with about 5 other new employees, attended an orientation session conducted by Bonnie Welch. Respondent admitted that Bonnie Welch is a human resource generalists. Welch explained several matters including wages. She told the employees they would get a 50-cent raise in 3 months, another 25 cents 3 months later, and then in July they would get their union raise of 75 cents. Holloman did not receive a 75-cent raise in July. During a fall 1997 employees' meeting, Holloman asked General Manager William Richardson about their failure to get the July raise. Richardson answered that he did not know but that he would get back to Holloman.

Natroy Courts was hired in April 1997. Bonnie Welch conducted the orientation session. Welch went over the employees' handbook. Welch said the employees would be starting at $7.75 an hour and there would be a plant raise of 75 cents in July. Travis Murphy has worked for Respondent since January 1997. During his orientation session Robin Deel told Murphy and five other new employees, their first raise would be in 3 months and then 6 months and everybody would get a union raise in July. Edgar Grayson has worked since August 23, 1996. Bonnie Welch held his orientation session which included 4 more employees. Welch told the employees they would get a 50-cent raise within 90 days. She said they would get a 75-cent raise in July that was intended for everyone. Grayson did not receive that 75-cent raise and he complained to the Union in September 1997.

Bonnie Welch has worked for Respondent since 1992. She is a human resources generalist on the first shift and supervises the payroll department, accounts payable. She interviews new hires and is involved in the orientation of new employees. During interviews she discussed wages. After Respondent signed the collective-bargaining agreement she used a laminated letter showing wages (R. Exh. 2) and explained what the applicant's wages would be for the first 2 years. She did not say anything about the second and third year wages even though both are listed on the sheet she used in interviews. On occasion Welch conducted the orientation interview. She testified that she did not discuss wages in that interview but if an employee asked something about wages she invited the employee to her office after orientation, where she showed the employee the laminated sheet on wages (R. Exh. 2). Bonnie Welch denied that she ever told applicants or employees they would get a 75-cent-union - wage increase during July.

Welch recalled that some employees asked about the July 1997 raise. They asked which employees would get the raise and some said they felt they should have received the raise. She admitted that she told some employees that she would check on it and get back to them. She did check with Dale Rosser (general manager). Rosser told her that he would have to look at his notes and get back to her. However, Rosser did not answer the question until after the July 1997 wage raise was granted.

Robin Deel testified that she is an accounts payable clerk, not a supervisor and that she has never had a role in hiring, interviewing, or giving orientation to employees. She denied that she has ever told any employee they will receive a 75-cent raise after the second and third year of the contract. The General Counsel withdrew allegations regarding Robin Deel.

Respondent called Rankin who was a bargaining unit employee before September 1997. Rankin, Robyn Estes, and several employees were in the repack office before Rankin became supervisor. Robyn Estes explained that Respondent was granting the July 1997 pay increase to only employees with 2 or more years seniority. She said that was not fair and they were going to fight and try to get everybody the 75-cent raise.

FINDINGS

Credibility

The evidence is not in dispute regarding contract proposals made by the two parties. I find that the Union made written contract proposals on February 6 (R. Exh. 5) and May 9, 1996 (R. Exh. 6). Respondent made a contract proposal on May 23 (R. Exh. 11), and three proposals on July 23, 1996 (R. Exh. 7, 8, and 3). Both of the union proposals indicated that each figure indicates the proposed top rate of pay. All Respondent's proposals listed only "Top Out" for the second and third year wage increases.

There was a dispute regarding discussion during negotiations. Bruce Raynor testified that General Manager Rosser said that Respondent's July 23 second and third year wage proposal

applied across the board. Rita Cockman testified that Respondent Negotiator Peter Palmer said the wage proposal was across the board and she asked what across the board meant. General Manager Dale Rosser replied that it meant that everybody gets it.

Robyn Estes testified that Peter Palmer made a verbal proposal during the meeting which included "an across the board fifty cent raise which would go into effect immediately, and then there would be two seventy-five cent raises on the anniversary date of the contract the next two years." Some time later Rita Cockman asked is this raise across the board and Dale Rosser said it was across the board.

Respondent's witnesses Dale Rosser, Peter Palmer, and Bruce Petesch denied that anyone for Respondent said the second and third year wage proposals were across the board.

In consideration of what actually occurred during the July 23 negotiations, I have tried to understand the atmosphere of that meeting and the actual impact of various conversations. The record showed that Respondent had three representatives. Those three were Peter Palmer, Bruce Petesch, and Dale Rosser. The union negotiating team included Union Representatives Bruce Raynor, Dave Prouty, Anthony Ramano, Mike Zucker, Tony Gallifonio, and Mike Freeman and 12 or 13 employees on the regular negotiating committee. There were at least 21 people from both sides. Against that background I am not convinced to find that everyone was aware of what was said between Rita Cockman and Dale Rosser. I credit the testimony that Cockman asked, and General Manager Dale Rosser replied, that Palmer's proposal was across the board. To the extent there was confusion between Raynor, Cockman, and Estes, I credit the testimony of Robyn Estes. Estes demonstrated a better recollection of what was said between Cockman and Rosser. I do not credit Dale Rosser's denial that he made such a comment.

However, I do not find that Bruce Raynor, Rita Cockman, Peter Palmer, and Bruce Petesch were being untruthful in their testimony regarding what was or was not said in that meeting about across the board. Their testimony may show what each of those witnesses actually believed considering the number of people in the room and the apparent confusion during the final part of that meeting. In making that determination I have relied on the testimony of Estes that no one from Respondent other than Rosser, said anything after Cockman asked about across the board.

There was also a dispute as to whether Respondent, through a supervisor, told new hires they would receive a 75-cent-wage increase in July. Employees Tyrone Holloman Jr., Natroy Courts, and Edgar Grayson testified that Supervisor Bonnie Welch talked to them in orientation sessions and that Welch said that everyone would receive a 75-cent raise in July. Bonnie Welch denied that she made those statements. In view of their demeanor and the full record, I am convinced that Holloman, Courts, and Grayson testified truthfully. I credit their testimony that Bonnie Welch told employees that all employees would receive a 75-cent raise in July.

Conclusions

The General Counsel argued that Respondent unilaterally changed its terms and conditions of employment by refusing to grant unit employees other than top out employees, a second year wage increase.

The Board explained an employer's obligation before making unilateral changes in *Milwaukee Spring II,* 268 NLRB 601, 602 (1984) (footnotes omitted):

> Section 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment" . . . before reaching a good-faith impasse in bargaining. Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to "modif[y] . . . the terms and conditions contained in the contract: the employer must obtain the union's consent before implementing the change.

Here, a collective-bargaining agreement was in effect. The question here, is, did Respondent modify the terms contained in that agreement.

> "where . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, (the Board) will not seek to determine which of two equally plausible contract interpretations is correct." *Atwood & Morrill Co.,* 289 NLRB 794, 795 (1988); cited in *Westinghouse Electric Corporation*, 313 NLRB 452 (1993) enfd. 1995 U.S. App. LEXIS 1023; 130 Lab. Cas. (CCH) p11,366 (4th Cir. 1995).

The instant dispute is solely one of contract interpretation and there is no evidence of animus, bad faith, or intent to undermine the Union. Therefore, I must consider whether Respondent acted pursuant to a plausible interpretation of relevant contractual provisions in limiting its July 1997 wage increase to top out employees.

The relevant contract provisions are:

Second Year (Effective Date Based on Contract)				
Top Out	$10.25	$9.75	$13.75	$9.25
Third Year (Effective Date Based on Contract)				
Top Out	11.00	10.50	14.50	10.00

Respondent granted all top out employees a wage increase at the beginning of the second year of the contract but failed to grant that wage increase to unit employees that were not top out employees. Respondent argued that is a plausible interpretation of the contract.

As shown above, the contract does mandate a wage increase for top out employees at the beginning of the second year. Respondent granted that wage increase. The contract is silent as to whether any other unit employees are entitled to a wage increase at that time. Respondent did not grant those employees a wage increase.

Nevertheless, the General Counsel and the Union contend that the contract was meant to include not only top out employees but also all unit employees. The General Counsel cited *Conoco, Inc*., 318 NLRB 60 (1995), for the proposition that the Board in interpreting a contract, attempts to determine the inherent plausibility of the term or clause in question. There, the Board cited *Mining Specialists*, 314 NLRB 268, 269 (1994), in holding:

> In contract interpretation matters like this, the parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight. To determine the parties' intent, the Board normally looks to both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to

> the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. (Footnotes omitted.)

In consideration of the General Counsel's argument, I am aware of Board precedent for refusing to consider parol evidence in instances where contract language is not ambiguous. In *CJC Holdings, Inc*., 315 NLRB 813 (1994), enfd. 97 F.3d 114 (5th Cir. 1996), the Board agreed with the administrative law *"judge's refusal to allow parol evidence concerning art. X, sec. 3, of the contract, as that contract language is not ambiguous."* Here, it does not appear that the contract language is ambiguous. Respondent granted wage increases to the top out employees and that is all that is required by the contract.

Nevertheless, I shall consider the points raised by the General Counsel and the Union. The General Counsel argued that the wage scale language of the contract is ambiguous on its face in that (1) since the language does not include all the unit employees it is deficient for lack of specificity and (2) Respondent, itself, interpreted the contract to require second and third year wage increases to all unit employees. As to point (2), the General Counsel cited a press release by Respondent (U. Exh. 2) arguing that the fact that press release made no mention of limiting the annual wage increase to top out employees, showed Respondent interpreted the contract to require wage increases for everyone. Additionally, employees Tyrone Holloman Jr., Natroy Courts, and Edgar Grayson credibly testified that Supervisor Bonnie Welch talked to them in orientation sessions and that Welch said that everyone would receive a 75-cent raise in July.

In regard to the General Counsel's first point, no cases were cited and I am unaware of any that stand for the proposition that a contract is ambiguous which shows that the parties agree to a clause which is silent on a particular point.

As to the General Counsel's second point, Union Exhibit 2 does not include language regarding whether employees other than top out, were to receive a wage increase at the beginning of the second year of the contract. It does nothing more than the language in the contract to clear up any concerns on that point. I do not agree that Respondent's failure to mention a point left silent in the contract demonstrates that Respondent interprets the contract to require affirmative action on that silent point.

The record did establish that Supervisor Bonnie Welch told some new hires that they would receive the July wage increase. That evidence may not establish past practice in regard to the effectuation or implementation of the contract provisions in question but, it does tend to show intent to grant the wage increase to all the employees. Cf. *Mining Specialists*, 314 NLRB 268, 269 (1994). As shown here, since this was the first contract between the parties and this was the first occasion for a July wage increase, there was no actual past practice of effectuation or implementation. Despite Welch's comments to new employees the applicable rule of law appeared in a recent court of appeals opinion:

> Where the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, the Board properly declined to determine which of two equally plausible contract interpretations is correct. In such cases, the appropriate action for the Board is to dismiss a complaint allegation of unlawful unilateral change. (Footnotes omitted.) *Salaried Employees Association of the Baltimore Division v. NLRB*, 1995 U.S. App. LEXIS 1023; 130 Lab. Cas. (CCH) P11,366 (4th Cir. 1995).

Moreover, cases cited by the General Counsel must be distinguished. *Mining Specialists*, 314 NLRB 268, 269 (1994), involved, "*evidence of animus, bad faith, or an intent to undermine the Union. . . .*" There was no evidence of animus, bad faith or intent to undermine the Union in the instant case. In *Conoco, Inc*., 318 NLRB 60 (1995), the Board found that the contract specifically prohibited the action taken by the employer and that the employer did not elect an equally plausible interpretation of the contract provisions in taking action to increase the number of progression units. Here, the contract was silent on the point at issue and I find that Respondent did elect an equally plausible interpretation of the contract. The Supreme Court in *NLRB v. C & C Plywood Corp*., 385 U.S. 421 (1967), found that the court of appeals erred in deciding that "a provision in the agreement between the union and the employer, which "arguably" allowed the employer to institute the premium pay plan, divested the Board of jurisdiction to entertain the union's unfair labor practice charge." Here, the issue was not arguable interpretation of the contract provisions and the finding here involved consideration of the contract provision.

The General Counsel also argued that evidence of the July 23 negotiation session proved that the parties agreed to include all employees. As shown above, I credit the testimony of Robyn Estes. Estes' full testimony on that point included:

> A. On the last day we were negotiating the wage settlement. Before that time we had several proposals which was passed back and forth between the two parties. On this last day we were trying to come to an agreement on the wage proposal.
>
> We had made a proposal and the Company made a proposal and we had not reached an agreement. The Company went out to caucus and came back in. Mr. Palmer had on a piece of paper, on a white piece of paper written out a wage proposal that the Company had.
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> He came in said they had a proposal. He read from a piece of paper. He said this is our proposal. This is the final proposal that we're going to make. I feel that it is a fair proposal and this is what we have. He had included in the proposal was an increase in the bank of hours which gave eight more bank of hours.
>
> We had asked for two additional holidays which was also included in their proposal. ***There was an across the board fifty cent raise which would go into effect immediately, and then there was to be two seventy-five cent raises on the anniversary of the contract the next two years.***
>
> ***Q. Fifty cent raise across the board?***
>
> ***A. Yes.*** (Emphasis added.)
>
> Q. All right, go ahead.
>
> A. He read this and he said I feel this is a fair proposal. This is what we have and they were not offering anything else. We asked to caucus at that time. We did. We discussed the proposal given by Mr. Palmer.
>
> We went around the room and every person on the negotiating committee voiced an opinion about the proposal whether or not we should accept it, what we should do. We decided when the Company came back in to take the proposal and go to the membership to see what they felt about it.

Q. Now when you came back in the last time was there some discussion about the wage proposals in way of wrap ups?

A. I'm sorry. Could you repeat that?

Q. Was there some discussion by the Company again by the way the proposals—were there any questions?

A. Yes, there were. Mr. Raynor asked some questions and then Rita Cockman who is—I was sitting next to Mr. Prouty and there was another person sitting next to me and Rita was sitting next to that person. ***Rita said that she had a question and she asked the question is this raise across the board and Dale answered the question. He said it was across the board and no one else on the Company side said anything.*** (Emphasis added)

I believe after that Bruce Raynor asked another question and no one said anything about the increase not being across the board.

Q. You indicated Dale is that Mr. Dale Rosser?

A. Yes.

Even if the parol evidence issue was decided in favor of the General Counsel, I am not convinced that the parties verbally agreed to include everyone in the July 1997 wage increase. As shown above, all Respondent's written wage proposals showed only top out for the second and third year increases. Moreover, the credited testimony of Robyn Estes shows that the parties may or may not have agreed to include all employees in the annual wage increases. A "plausible" interpretation of that conversation would show that Rita Cockman asked about across the board and Rosser's reply was to the only portion of Respondent's proposal that involved across the board. As shown above Peter Palmer proposed "there was an across the board fifty cent raise which would go into effect immediately, and then there was to be two seventy-five cent raises on the anniversary of the contract the next two years." That interpretation would be plausible and would show that only the immediate 50-cent raise would be across the board.

I find that the General Counsel failed to prove that Respondent engaged in unfair labor practices as alleged in the complaint.

CONCLUSIONS OF LAW

1. Kmart Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not engage in unfair labor practices by unilaterally changing working conditions regarding its July 1997 wage increase.

On the foregoing findings, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended

ORDER[7]

The complaint is dismissed.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.